24

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 372

CHERRYWOOD APARTMENTS, INC., OAKWOOD APARTMENTS, INC., APPLEWOOD APARTMENTS, INC., ET AL.,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CARL L. SHIPLEY,
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INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutory and contract provisions involved	2
Statement	4
Reasons for granting the writ	4
1. The Lanham Act—Express Language	5
2. The Lanham Act—Purpose	6
3. Implied undertaking of the Government	6
Conclusion	7

Statutes Cited

Lanham Act (54 Stat. 1125, as amended (42 U.S.C. 1521, *et seq.*):	
Sec. 1	2, 5
Sec. 313	3
Sec. 501	5
United States Code, Title 28, Section 1255(1)	1

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CHERRYWOOD APARTMENTS, INC., OAKWOOD APARTMENTS, INC., APPLEWOOD APARTMENTS, INC., WOODSIDE BUILDING CORPORATION, WOODLAND PARK, INC., *Petitioners,*

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Carl L. Shipley, on behalf of petitioners listed above, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on July 9, 1951.

Opinions Below

The opinion of the Court of Claims (R. 7-10) is not yet reported.

Jurisdiction

The judgment of the Court of Claims was entered on July 9, 1951 (R. 10). The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

Questions Presented

The questions presented are:

1. Whether the court below erred in construing the Lanham Act, (54 Stat. 1125) as amended, as imposing no limitation upon the Government's authority to operate temporary war housing constructed pursuant thereto, except the Administrator's absolute discretion, and

2. Whether the court below erred in concluding that the Lanham Act, the President's housing proclamation of Dec. 14, 1946, and the activities of the Federal Housing Authority in inducing plaintiffs to construct rental housing of a specified type, taken as a pattern of conduct, do not constitute an implied undertaking on the part of the Government not to engage in destructive competition with plaintiffs' private rental housing operations.

Statutory and Contract Provisions Involved

1. The Lanham Act, (54 Stat. 1125) as amended, (42 U. S. C. 1521 et seq.) provides that the Administrator is authorized to build and operate temporary war housing on certain specific conditions, towit, for persons engaged in national defense activities, in those localities in which the President has found that an acute shortage of housing exists or impends which would impede national defense activities and that such housing will not be provided by private capital when needed (Section 1) or, for distressed families of servicemen and for veterans and their families, who are affected by evictions or other unusual hardships, where their needs cannot be met through utilization of the existing housing supply, in localities where the Administrator has found that an acute shortage of housing exists or impends, and that, because of war restrictions, permanent housing cannot be provided in sufficient quantities

when needed (Section 501), and that the Administrator shall remove all temporary war housing as promptly as may be practicable and in the public interest (Section 313) (R. 2, 9).

2. In 1944 and 1945 the Government, pursuant to the Lanham Act, constructed, and since then has operated, temporary war housing at Front Royal, Virginia (R. 1, 6, 8, 9, 15).

3. On December 14, 1946, the President by proclamation (White House release #936) urged private builders to construct rental housing and promised the aid of executive agencies, Congress, and the Government in general in the construction, financing and operation of private rental housing (R. 2, 8).

4. In 1947 and 1948 plaintiffs, in response to the President's promises of December, 1946, and in reliance on the limitations on Government operation of temporary war housing contained in the Lanham Act, and after approval and inducement by the Federal Housing Authority, constructed, and have since operated private rental housing units at Front Royal, Virginia (R. 1, 8).

5. Despite the fact that the President, as required by the Lanham Act, has made no finding since 1944 that there is an "acute housing shortage" in Front Royal, Virginia, which will impede national defense and which will not be met by private capital, and despite the fact that there has been no substantial defense activity in Front Royal since 1945, the Government has continued to operate said temporary war housing providing rental housing for more than 10% of the total population of the city, renting to tenants who are neither defense workers, distressed families of servicemen, nor veterans and their families who are affected by evictions or other unusual hardships, in clear violation of the plain language of the Lanham Act, while a surfeit of private rental housing, built in response

to the Government's inducements and promises of aid and assistance, stands idle and empty (R. 3, 5).

Statement

This action was instituted by a petition filed in the Court of Claims by plaintiffs to recover damages arising out of violation by the Government of the Lanham Act, and breach by the Government of an implied undertaking not to engage in unfair and destructive competition with private rental housing built in response to the President's promises of December 14, 1946, and in reliance on the Federal Housing Authority's determination that such private housing was needed, and the general pattern of conduct of the Government which clearly implied aid and not destructive and unfair competition.

Defendant demurred to plaintiffs' petition.

The Court of Claims held that while the Government's activities were illogical, they did not spell out a promise to close down the Government's temporary war housing as soon as private housing caught up with the demand, and that the removal of temporary war housing from the rental market depends on the Administrator's sole discretion, statutory provisions to the contrary notwithstanding.

Reasons for Granting the Writ

We submit that the holding of the Court of Claims not only ignores the express language of the Lanham Act, but also disregards its plain purpose. Moreover, it fails to take into account the realities of ordinary business practice which are embodied in the law of implied agreements, and, if the decision is allowed to stand, will utterly discourage the construction of private rental housing in any locality where Government temporary war housing is in operation, thus perpetuating a housing shortage, and re-

quiring the permanent operation by the Government of emergency housing. Also, if allowed to stand, the decision sets up an insoluble dichotomy, *i.e.*, either the Administrator can at his discretion rent temporary war housing to anyone under any circumstances, regardless of the existence of available private housing or the fact that his tenants do not fall within the statutory classes of war workers, servicemen, or distressed veterans, which is judicial authorization for violation of the Lanham Act, or, the Lanham Act authorizes the Government to engage in the business of rental housing regardless of any connection with a federal constitutional purpose, which construction of the Lanham Act makes it unconstitutional on its face. Congress has no power to put the Government in the rental housing business as an end in itself, but only if that be a legitimate and appropriate means to a constitutional end, which here is housing persons directly connected with the war effort.

In view of the manifest importance of this decision and the substantial doubts as to its correctness, we submit that this case is appropriate for review here.

1. *The Lanham Act—Express Language*

The Lanham Act in Sec. 1 and Sec. 501 sets forth in explicit and exclusive detail the classes of persons for whom the Government is authorized to provide temporary war housing, towit, "persons engaged in national defense activities, and their families," or "distressed families of servicemen and veterans and their families who are affected by evictions or other unusual hardships", and no others. The Act also provides in explicit and exclusive detail the conditions under which the Government may provide these specified classes of persons with temporary war housing, towit, for the first class, "* * * in those areas or

localities in which * * * an acute shortage of housing exists * * * which would impede national defense activities and * * * would not be provided by private capital * * *", and for the second class, "* * * in those areas * * * where * * * an acute shortage of housing exists and * * * because of war restrictions permanent housing cannot be provided * * * (Where their needs cannot be met through utilization of the existing housing supply) * * *". Absent these classes of persons or these specific conditions, the Government has no statutory authority to operate temporary war housing.

2. *The Lanham Act—Purpose*

The plan and purpose of the Lanham Act of 1941 is clear. From beginning to end it is instinct with the intent of Congress under the war powers of the Constitution to vest in the Executive the authority, for emergency purposes only, to build and operate temporary war housing for war workers and service personnel in those extraordinary situations where private enterprise, because of material shortages, and governmental restrictions, could not supply the housing when needed.

3. *Implied Undertaking of the Government*

Agreements implied in fact arise out of the actions of the parties undertaken with the intent of evoking responsive action from each other. In this case the Government engaged in a pattern of conduct which was intentionally designed to encourage private enterprise to build rental housing by promising aid and assistance. No business man in his right mind would have supposed the Government with one hand would beckon him into business with promises of aid and support, and then with the other drive him into bankruptcy with an intentional course of destructive and unfair competition. Yet, fantastic as it seems, the

court below not only condones this conduct of the Government, but legitimizes it by finding statutory authority therefore in the Lanham Act.

Conclusion

For the above reasons, it is respectfully submitted that this petition should be granted.

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October 7, 1951.